82-1850



NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STEVEN BROWN, and
BOARD OF TRUSTEES OF THE PUBLIC
LIBRARY OF DES MOINES, IOWA,

Petitioner,

v.

DAN L. JOHNSTON, Polk County Attorney,
and GERALD SHANAHAN, Chief, Division of
Criminal Investigation of the Iowa
Department of Public Safety, State of
Iowa,

Respondents.

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# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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## QUESTIONS PRESENTED

1. Whether patrons of a public library are afforded constitutional protection from disclosure of their identities, as borrowers of any of 106 books, to the State pursuant to a preliminary investigation of cattle mutilations?

2. What kind of showing must the State make in order to compel disclosure of the identities of all library patrons who, while exercising their First Amendment rights as incorporated by the Fourteenth Amendment, had ever borrowed any of 106 different books from the public library?

3. Whether the ex parte procedure under Rule 5(6) of the Iowa Rules of Criminal Procedure as interpreted by the Supreme Court of Iowa is unconstitu-

tional because it sweeps too broadly in its impact on First Amendment rights as incorporated by the Fourteenth Amendment when the State, pursuant to a preliminary investigation of cattle mutilations, may under Rule 5(6) without any showing at all, compel disclosure of all library patrons who have at any time borrowed any of 106 different library books?

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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STEVEN BROWN, and
BOARD OF TRUSTEES OF THE PUBLIC
LIBRARY OF DES MOINES, IOWA,

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v.

DAN L. JOHNSTON, Polk County Attorney, and GERALD SHANAHAN, Chief, Division of Criminal Investigation of the Iowa Department of Public Safety, State of Iowa,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF IOWA

The petitioner Board of Trustees of the Public Library of Des Moines, Iowa respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Iowa entered in this proceeding on January

19, 1983 and the order of the Supreme Court of Iowa denying a rehearing which was entered on February 10, 1983.

## OPINIONS BELOW

The trial court entered a written unpublished judgment. The opinion of the Supreme Court of Iowa was reported at 328 N.W.2d 50. (A1-A15). The denial of rehearing, unpublished, was by order of Supreme Court of Iowa en banc. (A16-A17).

## JURISDICTION

The judgment of the Supreme Court of Iowa was entered January 19, 1983. A timely application for rehearing was filed on February 2, 1983 and was denied on February 10, 1983. By the denial of the petitioner's application for rehearing, the opinion and judgment of the

Supreme Court on January 19, 1983 became the final judgment of the highest court of the State of Iowa.

This petition for certiorari is timely filed within 90 days of the aforesaid denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

Fourteenth Amendment.

> Section 1. . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; ...

First Amendment.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; . . .

Statutes:

Rule 5(6) of Iowa Rules of Criminal Procedure.

> Investigation by prosecuting attorney. The clerk of the district court, on written application of the prosecuting attorney and the approval of the court, shall issue subpoenas including subpoenas duces tecum for such witnesses as the prosecuting attorney may require in investigating an offense, and in such subpoenas shall direct the appearance of said witnesses before the prosecuting attorney at a specified time and place. Such application and judicial order of approval shall be maintained by the clerk in a confidential file until a charge is filed, in which event disclosure shall be made, unless the court in an in camera hearing orders that it be kept confidential. The prosecuting attorney shall have the authority to administer oaths to said witnesses and shall have the services of the clerk of the grand jury in those counties in which such clerk is regularly employed. The rights and responsibilities of such witnesses and any penalties for violations thereof shall otherwise be the same as a witness subpoenaed to the grand jury.

## STATEMENT OF THE CASE

On November 27, 1979, a county attorney's subpoena duces tecum, under Rule 5(6) of the Iowa Rules of Criminal Procedure, was directed to the custodian of records of the Des Moines Public Library. The subpoena was not restricted to time nor did it define with particularity any records or individuals; it directed the custodian of records to appear before the District Court with all records of persons who had checked out any books represented by fifteen different call numbers and one fictional book. The library had one hundred six different volumes represented by the call numbers.

The Des Moines Public Library does not compile information pertaining to who may have used a particular book. Records of transactions are kept only to

determine whether borrowed materials are timely returned. The library would have to review one million, one hundred thirty-nine thousand, one hundred forty-one (1,139,141) transactions if the subpoena had been restricted only to the business year 1978-1979.

The application for the county attorney's subpoena duces tecum stated the purpose of the requested for information is "[t]hat the State of Iowa is currently investigating numerous mutilations of domestic animals" and that "to complete said investigation" the Department of Criminal Investigation and Polk County Attorney's Office need the library records requested.

On November 29, 1979, library patron Steven Brown filed a petition in the District Court for Polk County request-

ing declaratory and injunctive relief naming the Public Library of Des Moines Board of Trustees (hereinafter library board) and Gerald Shanahan as Director of the Division of Criminal Investigation of the State of Iowa as defendants. Subsequently, the library board on November 30, 1979 then filed a petition against Dan L. Johnston, Polk County Attorney, State of Iowa, and Gerald Shanahan. On January 22, 1980, the two actions were consolidated, recasting the library board as a plaintiff.

Steven Brown and the library board argued to the trial court for the following matters: 1) that constitutionally protected rights were violated by the subpoena procedure; 2) that disclosure of the information sought was an unwarranted invasion of the patrons' right to

privacy; 3) that substantial loss of freedom of expression and pursuit of constitutionally protected First Amendment activity would result by the enforcement of the subpoena; 4) there would be a chilling effect upon the exercise of First and Fourteenth Amendment rights.

A hearing was held by the trial court on June 12, 1981. At the hearing, evidence was introduced by the plaintiffs, but the defendants declined to offer any evidence. The trial court filed a final judgment on September 17, 1981, denying the relief sought. An appeal was taken from the Iowa District Court for Polk County to the Supreme Court of Iowa.

Steven Brown and the library board asserted in their appeal to the Supreme

Court of Iowa that federal constitutional rights afforded library patrons protection from disclosure of the information sought. The Iowa Supreme Court addressed the federal constitutional issue and held that a constitutional protected right of privacy in library records does not exist. "The State's interest in well-founded criminal charges and fair administration of criminal justice must be held to override the claim of privilege here." (A14).

The library board, in it's petition for rehearing, asserted that the State had failed to meet the showing necessary under principles of law established by this Court; that the Iowa Supreme Court's interpretation of Rule 5(b) of the Iowa Rules of Criminal Procedure sweeps too broadly in its impact on con-

stitutionally protected rights. The petition was summarily denied. (A16-A17).

## REASONS FOR GRANTING THE WRIT

1. The Iowa Supreme Court's interpretation of Rule 5(6) of the Iowa Rules of Criminal Procedure allowing the compelled disclosure of the identities of library patrons will have a chilling effect on the exercise of First Amendment rights of library patrons.

This Court has long recognized that the First Amendment encompasses more than free expression. Not only does it protect the right to disseminate information but also the individual's right to receive information. Martin v. Struthers, 319 U.S. 141 (1943); Thomas v. Collins, 323 U.S. 516 (1945); Lamont v. Postmaster General, 381 U.S. 301 (1965); Griswold v. Connecticut, 381 U. S. 479 (1965). To hold otherwise would

mean that rights explicitly granted in the Constitution would have no effect. Lamont v. Postmaster General, supra, at 308, (Brennan, J., concurring).

Protection of the right to receive information is essential to having an informed citizenry in the exercise of their First Amendment rights. "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read [cite omitted] and freedom of inquiry, freedom of thought, and freedom to teach [cites omitted]...." Griswold v. Connecticut, supra, at 482. The Des Moines Public Library provides its patrons the opportunity to exercise their rights to read, to inquire, and to educate themselves. "Teachers and students must

always remain free to inquire, to study and to evaluate, to gain new maturity and understanding...." Sweezy v. State of New Hampshire, 354 U.S. 234 (1957). The exercise of these freedoms, which are essential for all, must be afforded a measure of privacy. In recognition of this, the Board of Trustees of the Public Library, pursuant to a longstanding policy, prohibits the release of information regarding a patron's reading choices.

This Court has recognized a right to anonymity in the exercise of First Amendment rights. NAACP v. Alabama, 357 U.S. 449 (1958); Talley v. California, 362 U. S. 60 (1960). "In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion." Griswold v. Connecticut,

supra, at 483. If the protection of privacy is not afforded, many persons are likely to be inhibited from exercising fully their First Amendment rights.

Conflicts between investigatory needs and First Amendment rights with the concomitant anonymity concerns have already been before the Court. E.g., NAACP v. Alabama, supra; Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963); Sweezy v. New Hampshire, 354 U.S. 234 (1957). Moreover in U.S. v. Rumeley, 345 U.S. 41 (1953), the Court recognized without deciding that serious First Amendment concerns were raised when a committee of Congress sought to compel the disclosure of the names of those who had made bulk purchases of books.

The decision below allows the State

to unreasonably interfere with the library patron's constitutionally protected right to read and study the books and periodicals of his or her own choosing. Moreover, the decision subjects the patron's reading interests to scrutiny by the State. The threat of becoming a suspect in an investigation merely because of one's reading choices will chill the exercise of First and Fourteenth Amendment rights.

2. The Iowa Supreme Court's interpretation of the ex parte procedure under Rule 5(6) of the Iowa Rules of Criminal Procedure allowing the compelled disclosure of the identities of library patrons without requiring any showing on the part of the state is in conflict with principles of law established by this Court.

When the state interferes with the exercise of First Amendment rights, it

must first be shown that a compelling state interest exists to justify the interference. NAACP v. Alabama, supra, at 463, citing Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957) (concurring opinion). Additionally, this Court has held that when a legislative investigation intrudes upon First and Fourteenth Amendment rights, the State must "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." Gibson v. Florida Legislative Committee, 372 U.S. 539, 546 (1963). The state must make this same showing in order to compel the disclosure of the identities of the library patrons who have shown a reading interest in particular books.

It is questionable whether the state could show any relationship between cat-

tle mutilations and Religion in the Age of Aquarius, one of the books represented by the call numbers listed in the subpoena. In fact, the state made absolutely no showing at all. The state wholly ignored the principles of law established by this Court.

3. The Iowa Supreme Court's interpretation of Rule 5(6) of the Iowa Rules of Criminal Procedure allowing, pursuant to a preliminary investigation of cattle mutilations, the compelled disclosure of the identities of all persons who have at any time borrowed any of 106 different library books sweeps too broadly in its impact on constitutionally protected rights.

The principle that state action which affects constitutional rights must not sweep too broadly is firmly established. Griswold v. Connecticut, supra; NAACP v. Alabama, supra; Shelton v. Tucker, 364 U.S. 479 (1960); Talley v.

California, supra.

The only purpose served by the subpoena request is the generation of a suspect list comprised of persons who have borrowed books from the public library. The legitimacy of such a purpose is constitutionally suspect. Even when a governmental purpose is "legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton, supra, at p. 488.

The decision of the court below allows the state under Rule 5(6) of the Iowa Rules of Criminal Procedure to compel public libraries to disclose the reading interests of its patrons by the mere assertion that the information is necessary in its investigation of a

crime. This is in direct conflict with the decisions of this Court.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Iowa and the order of that court denying further review.

Respectfully submitted,

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IN THE SUPREME COURT OF IOWA

| | | |
|---|---|---|
| STEVEN BROWN, On Behalf of Himself and All Others Similarly Situated, | ) | |
| and | ) | Filed January 19, 1983 |
| BOARD OF TRUSTEES OF THE PUBLIC LIBRARY OF DES MOINES, IOWA, Appellants, | ) | |
| vs. | ) | 451 / 67495 |
| DAN L. JOHNSTON, Polk County Attorney, | ) | |
| and | ) | |
| GERALD SHANAHAN, Chief, Division of Criminal Investigation of the Iowa Department of Public Safety, State of Iowa, Appellees. | ) | |

---

Appeal from Iowa District Court for Polk County, Louis A. Lavorato, Judge.

Plaintiffs' appeal from district court denial of requests for an injunction and declaratory relief against en-

forcement of a subpoena duces tecum AFFIRMED.

Thomas J. McSweeney and Louise M. Jacobs, Assistant Des Moines City Attorneys, for appellant Library Board, and Gorden E. Allen, Des Moines, for appellant Steven Brown.

Thomas J. Miller, Attorney General, Gary L. Hayward, Assistant Attorney General, for appellee Gerald Shanahan, and James Smith, Assistant Polk County Attorney, for appellee Dan L. Johnston.

Considered by Harris, P.J., and McGiverin, Larson, Schultz, and Carter, J.J.

LARSON, J.

This case involves a confrontation between the investigative power of law enforcement authorities and the confidentiality provisions of Iowa Code chapter 68A. At issue is whether a county

attorney subpoena duces tecum for certain library circulation records is limited or restricted by section 68A.7 (13); and if not, whether there exists a constitutionally protected right of privacy in library records, which, when weighed against the public interest in effective criminal investigations balances in favor of the individual library patrons. We answer both questions in the negative and affirm.

This matter began when an agent of the Iowa Division of Criminal Investigation (DCI), who was investigating cattle mutilations in Polk and other counties, visited the Des Moines Public Library in November, 1979. He asked whether certain circulation records were available for inspection. The agent was told that as a matter of library policy, such records were confidential. At the re-

quest of the DCI, the Polk County Attorney, Dan L. Johnston, then applied for and was granted, pursuant to Iowa Rule of Criminal Procedure 5(6), a subpoena duces tecum, requiring the custodian of library records to appear and present "all records of persons who have checked out the books described in State's application." The State's application requested a long list of titles dealing mainly with witchcraft and related topics.

Shortly after the subpoena was served on the library, Steven Brown, a library card holder, filed a petition for declaratory and injunctive relief alleging the right to an injunction under Iowa Code section 68A.8 (1979). Brown's petition named as defendants the library board and the DCI chief. The suit sought to enjoin the examination

and copying of the library circulation records "absent a showing of compelling State interest" and requested a declaration that disclosure of such records was unconstitutional. The library board then filed its own petition requesting the court to enjoin enforcement of the subpoena and named as defendants the DCI chief and the Polk County Attorney. The two actions were later consolidated, and the library board was recast as a plaintiff.

Upon hearing, the district court entered a decree denying the declaratory and injunctive relief requested and ruled there was an adequate remedy at law: the library board of trustees could assert any defenses it had in a later proceeding to enforce the subpoena.

I. Applicability of Chapter 68A.

Iowa Code section 68A.7 lists the

public records which are to be considered confidential and the requirements for their release:

> The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information:
>
> ....
>
> 13. The records of a library which, by themselves or when examined with other records, would reveal the identity of the library patron checking out or requesting an item from the library.[1]

This court has previously confronted questions of applicability of chapter 68A. In Iowa Civil Rights Comm. v. City of Des Moines, 313 N.W.2d 491, 494 (Iowa 1980), we were asked to decide whether

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[1] Library records were added to section 68A.7 by amendment after these actions were filed but before the hearing on them in district court. It is not contended, however, that the amendment is inapplicable on retroactivity grounds.

section 68A.7 was applicable to administrative subpoenas. In that case, the City of Des Moines had resisted a subpoena duces tecum from the Iowa Civil Rights Commission, arguing the records sought were exempt from examination under confidentiality provisions of section 68A.7(11). We disagreed, holding that the exemptions of section 68A.7 were "applicable only within the framework of 'every citizen's general right to examine public records under chapter 68A.'" Id. at 495. We likened the commissioner's authority to conduct investigations to that of a grand jury, id. at 495, stating that: to hold otherwise "would contravene the public interest in redressing civil rights violations and frustrate the Commissioner's statutory investigative powers." Id. at 495.

We believe the present case dictates

a similar holding. The county attorney's investigative authority is comparable to and in some instances in lieu of the grand jury. See Iowa Const. amend. [9] (third amendment of 1884); Iowa R. Crim. P. 5(6) (providing county attorney with subpoena power in investigating crime). As such, the county attorney's investigative power must be broad to adequately discharge his public responsibility. See United States v. Calandra, 414 U.S. 338, 343-44, 94 S.Ct. 613, 618, 38 L.Ed.2d 561, 569 (1974); Branzburg v. Hayes, 408 U.S. 665, 701-02, 92 S.Ct. 2646, 2666, 33 L.Ed.2d 626, 651 (1972). To hold otherwise would limit the investigative power of the county attorney, while at the same time allowing administrative agencies to access the same records.

There is an additional basis upon

which a county attorney's subpoena duces tecum will override a claim of confidentiality: the confidentiality statute is inapplicable by its terms if the records are "ordered by a court." Iowa Code § 68A.7. Rule of criminal procedure 5(6) provides that such an order is a prerequisite for the issuance of the county attorney's subpoena, although it is actually issued by the clerk:

> The clerk of the district court, on written application of the prosecuting attorney and the approval of the court, shall issue subpoenas including subpoenas duces tecum for such witnesses as the prosecuting attorney may require in investigating an offense.... Such application and order of approval shall be maintained by the clerk in a confidential file....

(Emphasis added). While it is not clear in this case whether the application was "approved" by the court, the library personnel do not dispute the county at-

torney's claim that the subpoena was obtained in the manner provided by criminal rule 5(c).

Accordingly, we hold that section 68A.7(13) does not prevent execution of a county attorney's subpoena duces tecum.

II. Constitutional Challenge.

Brown and the library board also claimed constitutional protection of their right of privacy, based primarily on the first and fourteenth amendments to the United States Constitution, see N.A.A.C.P. v. Alabama, 357 U.S. 449,460-61, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488, 1498-99 (1958), as well as the fourth and ninth amendments, see State v. Pilcher, 242 N.W.2d 348, 356-57 (Iowa 1976). The effect of forced disclosure of library records would to be chill citizens' reading of unpopular or controversial books because others might learn of it,

according to them, any such inquiry would invade their fourth amendment zone of privacy.

Constitutional privileges against forced disclosure have been recognized in analogous circumstances. The Supreme Court recognized a qualified reporter's privilege based upon the first amendment in Branzburg, 408 U.S. at 680, 92 S.Ct. at 2656, 33 L.Ed.2d at 639; and the president's executive privilege was recognized in United States v. Nixon, 418 U. S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). Similarly, this court acknowledged a first-amendment privilege against forced disclosure in Lamberto v. Brown, 326 N.W.2d 305 (Iowa 1982) and in Winegard v. Oxberger, 258 N. W. 2d 47 (Iowa 1977).

These privileges, however, are not absolute; each claim of privilege must

be weighed against a societal need for the information and the availability of it from other sources. Even if we assume, as Brown and the library board urge, that a library patron's privilege exists, based upon the patron's right of privacy, it is only a qualified privilege. We must weigh the effect of forced disclosure of these records against the societal need for the information.

Branzburg and Nixon are closely analogous. They, like the present case, involved claims of privilege in connection with criminal investigations. Branzburg held that a first-amendment privilege claimed by a reporter must be subordinated to the interest of society in well-founded grand jury indictments. Branzburg, 408 U.S. at 685, 92 S.Ct. at 2658, 33 L.Ed.2d at 642. In Nixon, the Supreme

Court refused to apply the executive privilege claimed by the president in response to the government's request for information in a criminal investigation, because of the court's concern for the fair administration of criminal justice. Nixon, 418 U.S. at 711, 94 S.Ct. at 3109, 41 L.Ed.2d at 1066. See also Re Farber, 78 N. J. 259, 273, 394 A. 2d 330, 337, cert. denied, 439 U.S. 997, 99 S.Ct. 598, 58 L.Ed.2d 670 (1978) (refused to apply first-amendment privilege in criminal investigation).

We believe the rationale of these cases controls here. It is true the State's investigation was only preliminary; and as Brown and the library board argue, no suspects were identified nor was the search for information limited to any named library patrons. This does not diminish the need for the informa-

tion, however, as we assume the whole purpose in examining the record was to gain enough information so that the investigation could be narrowed.

The State's interest in well-founded criminal charges and the fair administration of criminal justice must be held to override the claim of privilege here. Brown and the library board have cited no cases to us which have reached a contrary conclusion under similar facts, and we have found none.

III. Oppressiveness of the Demand.

Because disclosure of this information is not barred by our confidential records act, for the reasons discussed in division I, the library's argument that the request is so overbroad and burdensome that it entitles it to injunctive relief under section 68A.8 is inapposite. We do not, however, fore-

close the possibility of obtaining some form of protective order in the future if the demand is in fact unduly burdensome. The record at this point is not sufficient for the court to make that determination.

AFFIRMED.

IN THE SUPREME COURT OF IOWA

| | | |
|---|---|---|
| STEVEN BROWN, On Behalf of Himself and All Others Similarly Situated, | ) | |
| and | ) | No. 67495 |
| BOARD OF TRUSTEES OF THE PUBLIC LIBRARY OF DES MOINES, IOWA, Appellants, | ) | |
| vs. | ) | O R D E R |
| DAN L. JOHNSTON, Polk County Attorney, | ) | |
| and | ) | |
| GERALD SHANAHAN, Chief, Division of Criminal Investigation of the Iowa Department of Public Safety, State of Iowa, Appellees. | ) | |

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After consideration by the court en banc, appellant Board of Trustees of the Public Library's petition for rehearing in the above-captioned case is hereby overruled and denied.

Done this 10th day of February, 1983.

THE SUPREME COURT OF IOWA

By_____
W. W. Reynoldson, Chief Justice

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NO. 82-1830

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STEVEN BROWN, and
BOARD OF TRUSTEES OF THE PUBLIC
LIBRARY OF DES MOINES, IOWA,

Petitioner,

v.

DAN L. JOHNSTON, Polk County Attorney,
and GERALD SHANAHAN, Chief, Division of
Criminal Investigation of the Iowa
Department of Public Safety, State of
Iowa,

Respondents.

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# SUPPLEMENTAL APPENDIX

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IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND FOR POLK COUNTY

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| STEVE BROWN on behalf of himself and all others similarly situated, | ) | |
| Plaintiff, | ) | EQUITY NO. CE 12-6586 |
| PUBLIC LIBRARY BOARD OF TRUSTEES OF DES MOINES, | ) | EQUITY NO. CE 12-6595 |
| Recast Plaintiff, | ) | |
| vs. | ) | |
| DAN L. JOHNSTON, POLK COUNTY ATTORNEY, | ) | DECREE |
| Defendant, | ) | |
| GERALD SHANAHAN, CHIEF, DCI, STATE OF IOWA, | ) | |
| Defendant and Indispensable Third-Party Defendant | ) | |

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STATEMENT

The above-styled action is the result of a consolidation of CE 12-6586, Brown v. Public Library Board and Gerald Shanahan, with CE 12-6595, Board of Trustees of the Public Library of Des

Moines v. Dan Johnston, Polk County Attorney and Gerald Shanahan, Chief, Division of Criminal Investigation of the Iowa Department of Public Safety. CE 12-6586 is a suit filed November 29, 1979 for declaratory and injunctive relief brought pursuant to Section 68A.8, The Code, and the First, Fourth, Ninth and Fourteenth Amendments of the U. S. Constitution brought by plaintiff on behalf of himself and other library card holders to enjoin the examination and copying of the records of the library pursuant to requests by Shanahan to the library in an ongoing criminal investigation and pursuant to a county attorney's subpoena issued and presented to the library. The petition alleges the following. Disclosure of the records requested is contrary to public interest and would substantially and irreparably injure the plaintiff and the class he

represents. It is in the public interest that books and periodicals borrowed remain confidential absent a showing of compelling state interest which has not been shown. Disclosure of records by the Board would infringe upon plaintiff's First and Fourteenth Amendment rights to read and study books and periodicals of his own choosing without unreasonable interference and scrutiny by the general public. The disclosure by the defendant insofar as it requires records to be open to public infringes upon plaintiff's First, Fourth, Ninth and Fourteenth Amendment rights in that Iowa Code Section 68A.1, 68A.2 and 68A.7 invade constitutionally protected rights of privacy. Plaintiff is suffering irreparable injury and threatened with irreparable harm in the future, and substantial loss or impairment of freedom

of expression and pursuit of constitutionally protected First Amendment activity as long as there are attempts to enforce the subpoena.

CE 12-6595 is an action filed on November 30, 1979 by the Board of Trustees of the Public Library of Des Moines. The petition alleges the following. The Board in 1970 had adopted a policy prohibiting the dissemination of information concerning the identity of materials used or requested by parties. On or about November 20, 1979 an agent of the state sought from the library the identity of individuals who had checked out certain materials which request was refused. On November 27, 1979 an assistant county attorney obtained a county attorney's subpoena, under Iowa Rules of Criminal Procedure Rule 5(6) without prior determination of cause, for rec-

ords of persons who had checked out books represented by sixteen call numbers. The subpoena was not restricted as to time or individuals, and compliance would require an extreme expenditure of time and expense and constitute an undue burden on the plaintiff-Board. Disclosure of information sought in the subpoena constitutes an unwarranted invasion of privacy of card holders of the library and would substantially and irreparably injure their constitutionally protected rights of privacy and would clearly not be in the public interest. Disclosure of information would substantially and irreparably injure the public right to free and open access to materials of information and disclosure would not be in the public interest. Plaintiff would be substantially irreparably injured as plaintiff stands in a fidu-

ciary relationship to the public. Plaintiff has no adequate remedy at law to prevent disclosure of the information sought, to protect the right of privacy of card holders, to avoid the undue burden of the subpoena, to avoid threat of criminal contempt, to secure policy of confidentiality and to defend the public right to free and open access to materials of information. The petition further recites that the plaintiff is entitled to bring this equitable action to restrain defendants from examination of records sought in the county attorney's subpoena, and requested an order quashing the county attorney's subpoena referred to (see States' application for county attorney's subpoena duces tecum, clerk of clerk's miscellaneous docket no. 1297, introduced as plaintiffs' exhibit No. 1, at the hearing before the

Court on June 12, 1981).

As a result of motions to consolidate and intervene, the two actions were consolidated on January 22, 1980 and CE 12-6586 was recast with the Library Board as a plaintiff and Dan Johnston, Polk County Attorney, and Gerald Shanahan, Chief, State Division of Criminal Investigation as defendants. Defendant Shanahan, on December 18, 1979 and January 4, 1980, filed motions to dismiss claims as to him for failure to state a claim upon which relief may be granted. After arguments, including briefs, the Court filed a ruling on January 29, 1980 overruling the motion to dismiss, in essence holding that it could not be said there was not some relief that could be granted under some set of provable facts. Subsequently, motions for summary judgment were filed by defen-

dants and by Brown. The Board did not join in the motion by Brown and resisted the motions of defendants on the basis there were existing issues of material fact. By ruling, dated June 23, 1980, these motions for summary judgment were overruled.

A hearing was conducted on June 12, 1981 at which exhibits were introduced, witnesses testified and oral arguments were presented. Plaintiffs' Exhibit 1 is a district court subpoena, case miscellaneous No. 1297, directed to the Library to bring to room at courthouse "all records of persons who have checked out the books described in the state's application for county attorney's subpoena duces tecum paragraph 2 (see attached) "[Plaintiffs' exhibit 8, "supporting statement of material facts", filed originally in support of defen-

dants' motion for summary judgment, in paragraph 9 states this application was approved on November 29, 1979 by Polk County District Court]. The attached application recited: "1. That the State of Iowa is currently investigating numerous mutilations of domestic animals. 2. That in order to complete said investigation, it is essential for the Department of Criminal Investigation and the Polk County Attorney's office to obtain from the Des Moines Public Library records showing the person or persons who have checked out the following books represented by the following call numbers." It was stated the request was made pursuant to Rule 5(6) of the Iowa Rules of Criminal Procedure. The call numbers listed were matched with titles and authors, on plaintiffs' Exhibit 2 and appeared to represent about 104 vol-

umes on witches, etc.

Mary Dunham, Administrative Assistant, Des Moines Library testified at the hearing as to certain matters. The subpoena referred to above was served on her on November 27, 1979 and the library declined to supply the records sought. The circulation records are kept at the main library but the library does not keep records by books, only by transaction. The transaction record (in pocket of book) is put on microfilm, has the title of the book, the call number, the author, and borrower's card number. Plaintiffs' Exhibit 5, presented at the time of the testimony of Dunham, presents a statement as to "Circulation Records-Cost to Access". This takes a situation of 1,490,000 records on hand [1978-79 Annual Report of Library, Plaintiffs' Exhibit 3, lists 1,139,141 loans;

the 1979-80 Report, Plaintiffs' Exhibit 4, lists 1,213,829], 5,000 records per reel, the fact that one person can "access" 30 items an hour, $4.17 per hour per person, and a total labor and cost without benefits of $208,527.92, $1,657.48, apparently for cost of film reader and typewriter, $156,781 for overhead by calculating a charge of 1/12 of annual building maintenance, utility, and equipment maintenance multiplied by a total calculated 6221 manpower days (or 17.04 years) to "access" the reels. This then produces a total of $366,966.40 cost to "access" the numbered circulation records.

Betty Houf, President of the Board and former member testified as to Board policy adopted in 1970 and reaffirmed in September, 1979. That policy is described in plaintiffs' Exhibit 7, offi-

cial Bulletin of Library, No. 1465, 1970: "Important notice to all employees, particulary [sic] those who work at public service desk. The following policy statement was adopted by the Board of Trustees on July 16, 1970. This is the official policy of the Library:

> It is the policy of the library board to protect, as far as possible, the privacy of patrons who use the library and not to make inquiry into the purpose for which a patron requests information on books. Staff members should not under any circumstances ever answer a third party about what a patron of the library is reading or requesting from the library's collection.

The reason given for the policy was to protect the right to privacy in material, and because the American Library Association has suggested guidelines.

Also testifying for plaintiff was Margaret Robinson, a teacher at Roosevelt High School (Des Moines), a teacher

of 22 years. In November, 1979, she had an advanced placement class in which she assigned 10 students to read books in the 133.4 call number range in the Des Moines Library. She did this as a preferred educational method, of having the students read original materials and learn research techniques. She had assumed these records were confidential; if she had known they would be checked, she would have lectured instead of sending students there.

At the hearing there was introduced a joint exhibit 10 which contained a statement of facts not in dispute, facts in dispute and legal issues. The facts in dispute are described as "*** whether the City of Des Moines, the Des Moines Public Library, their officers, agents and employees, or plaintiff Brown have a reasonable expectation of privacy such

as to give rise to constitutional protection. * * * Whether enforcement of the subpoena duces tecum at issue herein would place an undue burden on the recast plaintiff."

> The legal issues are stated to be:
>
> * * * Whether records rendered confidential by Section 68A.7, Code of Iowa (1979), are subject to subpoena, and, if so, what is the burden placed upon the party seeking their production* * *.
>
> * * * Whether third parties, about whom records subject to a subpoena duces tecum are kept have a right to notice and/or a hearing to challenge the enforcement of the subpoena* * *.
>
> * * * Whether the circulation records of a public library exist within a 'zone of privacy' protected by the First, Fourth, Ninth or Fourteenth Amendments to the United States Constitution* * *.
>
> * * * Whether the County Attorney's subpoena at issue herein is subject to Fourth Amendment probable cause restrictions or the Fifth Amendment ban on forced self incrimination* * *.

For the hearing held on June 12, 1981, the Public Library submitted a written brief which was concurred in by plaintiff Brown. Defendants did not submit any briefs in addition to those submitted at prior stages of the proceedings. The Court, having examined the record, considered the written briefs and the oral arguments, and the testimony presented at the hearing on June 12, 1981, and being fully advised in the premises files the following.

## APPLICABLE STATUTES

Section 68A.2, The Code, provides:

> Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential. The right to copy records shall include the right to make photographs or photographic copies while the records are

> in the possession of the lawful custodian of the records. All rights under this section are in addition to the right to obtain certified copies of records under Section 622.46.

Section 68A.3 provides in pertinent part:

> Such examination and copying shall be done under the supervision of the lawful custodian of the records or his authorized deputy * * * All expenses of such work shall be paid by the person desiring to examine or copy * * * If copy equipment is available * * * the fee for the copying service as determined by the lawful custodian shall not exceed the cost of providing the service.

Section 68A.5 provides in pertinent part:

> The provisions of this chapter and all rights of citizens under this chapter may be enforced by mandamus or injunction, whether or not any other remedy is available * * *.

Section 68A.7 provides in pertinent part:

> The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another

> person duly authorized to release information * * *.
>
> (13) The records of a library which, by themselves or when examined with other public records, would reveal the identity of the library patron checking out or requesting an item from the library [this was added in 68th G.A., 1980, Chapter 1024, "An act relating to the confidentiality of certain library records"; "Section sixty-eight A point seven (68A.7), Code 1979 is amended by adding the following new subsection:"; effective on publication March 26, 1980.]

Section 68A.8 provides in pertinent part:

> In accordance with the rules of civil procedure the district court may grant an injunction restraining the examination (including copying) of a specific public record, if the petition supported by an affidavit shows and if the court finds that such examination would clearly not be in the public interest and would substantially and irreparable injure any person or persons. The district court shall take into account the policy of this chapter that free and open examination of public records is generally in the public interest, even though such examinations

> may cause inconvenience or embarrassment to public officials or other * * *.

Iowa Rules of Criminal Procedure (Section 813.2, Iowa Code) Rule 5(6) provides:

> The clerk of the district court, on written application of the prosecuting attorney and the approval of the court, shall issue subpoenas including subpoenas duces tecum for such witnesses as the prosecuting attorney may require in investigating an offense, and in such subpeonas shall direct the appearance of said witnesses before the prosecuting attorney at a specified time and place. Such application and judicial order of approval shall be maintained by the clerk in a confidential file until a charge is filed, in which event disclosure shall be made, unless the court in an in camera hearing orders that it be kept confidential. The prosecuting attorney shall have the authority to administer oaths to said witnesses and shall have the services of the clerk of the grand jury in those counties in which such a clerk is regularly employed. The rights and responsibilities of such witnesses and any penalties for violations thereof shall otherwise be the same as a witness subpoenaed to the grand jury.

Rule 3 The Grand Jury (4)(e) provides:

> The clerk of the court must, when requested by the foreman of the grand jury or prosecuting attorney, issue subpoenas including subpoenaes duces tecum for witness to appear before the grand jury. The grand jury is entitled to free access at all reasonable times to county institutions and places of confinement, and to the examination without charge of all public records within the county.

Rules 3, (4)(h) provides:

> When a witness under examination before the grand jury refuses to testify or to answer a question, it shall proceed with the witness before a district judge, and the foreman shall then distinctly state before a district judge the question and the refusal of the witness, and if upon hearing the witness the court decides that the witness is bound to testify or answer the question propounded, the judge shall inquire of the witness if he or she persists in his or her refusal, and, if he or she does, shall proceed with the witness as in cases of similar refusal in open court.

Rule 14. Subpoenas. (2) provides in part:

> For production of documents-duces tecum * * *. A court on motion may dismiss or modify the subpoena if compliance would be unreasonable or oppressive.

Rule 14. Subpoenas (5) provides:

> Sanctions for refusing to appear or testify. Disobedience to a subpoena, or refusal to be sworn or to answer as a witness, may be punished by the court or magistrate as a contempt. The attendance of a witness who so fails to appear may be coerced by warrant.

DISCUSSION

1. Application of Iowa Rules of Criminal Procedure 5(6) to Board's claim of Undue Burden to Comply With Subpoena.

The Library Board presents the claimed undue burden and extreme expenditure of time and expense as reasons for equitable action to restrain enforcement of the subpoena. Before any inquiry into any constitutional objections to the investigation subpoena involved in this case or the possible application

of Chapter 68A, The Code, it is necessary to examine the Rules of Criminal Procedure to determine what is therein sanctioned. Note that Rule 5(6), supra, authorizes a subpoena duces tecum for "such witnesses as the prosecuting attorney may require in investigating an offense" and requires the "approval of the court." There is no stated requirement for a notice and hearing before granting the subpoena. Such a requirement seems clearly destructive of investigations; therefore, it is not reasonable to imply such a requirement. The court approval was secured. The county attorney's application does not on its face indicate it was simply a "fishing expedition." In further examination of the rule it is noted that: "The rights and responsibilities of such witnesses and any penalties for violations thereof

shall otherwise be the same as a witness subpoenaed to the grand jury." This requires examination of Rule 3, The Grand Jury. Particularly, see (4)(e) and (4)(h): (4)(e) "Securing witnesses and records. The clerk of the court must, when required by the foreman of the grand jury or prosecuting attorney, issue subpoenas including subpoenas duces tecum for witnesses to appear before the grand jury. The grand jury is entitled to free access at all reasonable times to county institutions and places of confinement, and to the examination without charge of all public records within the county." (4)(h) "Refusal of witness to testify. When a witness under examination before the grand jury refuses to testify or to answer a question, it shall proceed with the witness before a district judge, and the foreman shall

then distinctly state before a district judge the question and the refusal of the witness, and if upon hearing the witness the court decides that the witness is bound to testify or answer the question propounded, the judge shall inquire of the witness if he or she persists in his or her refusal, and, if he or she does, shall proceed with the witness as in cases of similar refusal in open court."

Further reference to procedure as to documents is made in Rule 14 Subpoenas (2) and (5): (2) "For production of documents-duces tecum. A subpoena may contain a clause directing the witness to bring with him or her any book, writing, or other thing under the witness' control which he or she is bound by law to produce as evidence. The court on motion may dismiss or modify the sub-

poena if compliance would be unreasonable or oppressive."

(5) Sanctions for refusing to appear or testify. Disobedience to a subpoena, or refusal to be sworn or to answer as a witness, may be punished by the court or magistrate as a contempt. The attendance of a witness who so fails to appear may be coerced by warrant." See also Section 622.76, failure to obey subpoena without sufficient cause or excuse is contempt; Section 665.2(4) (disobedience to subpoena is contempt) and 665.7 (notice to show cause).

Accordingly, it is concluded that, under the Iowa Rules of Criminal Procedure, the Library Board may answer the subpoena by asserting in defense whatever defenses the Library Board believes it has, as the oppressive nature of the request, when called before the judge,

as contemplated in RCP 3(4)(h), or by proceeding under RCP 14 by a specific motion to dismiss or modify the subpoena on the basis compliance would be oppressive or unreasonable. The Board should assert whatever defense it believes it has in the criminal procedures rather than filing a petition in equity to quash the subpoena; there has been no demonstration its remedy at law would not be adequate. See the general principle that ordinarily equity will not restrain criminal proceedings. 42 Am. Jur.2d Injunctions Section 238; Snouffer & Ford v. City of Tipton, 161 Iowa 223, 142 N.W. 97 (1913). There is no prejudgment in such a statement, as to whether the Library Board, as a part of a unit of local government and subject to control by the legislature (See Pape v. Westerdale, 254 Iowa 1356; 121 N.W.2d

159 (1963), may assert a defense, as the Library Board has, that it's costly to comply, and therefore oppressive and unreasonable. The Legislature has decreed the Rules of Criminal Procedure, Section 813.1 et. seq., Iowa Code.

2. Interaction of Rules of Criminal Procedure and Chapter 68A, Iowa Code.

Both plaintiffs and the Library Board argue for the application of Section 68A.8 to this case and for its application so as to support the granting of equitable relief against the subpoena. First, a matter of rules of statutory interpretation should be noticed. Section 4.7, The Code, provides:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision.

Chapter 68A is obviously the general statute, as to public records, because it states that <u>every citizen</u> of the state has the right to examine <u>all</u> public records and news media may publish such records. The declaration of confidentiality in Section 68A.7 is as to the right of <u>any citizen</u>. The Rules of Criminal Procedure, 5(6), as to prosecuting attorney, and Rule 3 as to Grand Jury, are special as to the rights to investigate and subpoena documents in law enforcement activities. Therefore, the Rules of Criminal Procedure should control. Also in support of the conclusion that the Rules of Criminal Procedure control over Chapter 68A, as to library records, is that Chapter 1024, 68th G.A. 1980, which adds library records to the public records which are to be kept confidential, indicates only an

amendment of Chapter 68A, because the title merely states: "An act relating to the confidentiality of certain library records" and specifically states it is amending Section 68A.7 and does not refer to any other Code sections.

Although it is concluded above that the Rules of Criminal Procedure should control, at least from the point of view of statutory interpretation, over Chapter 68A, as the requirements for compliance with the investigative subpoena, an examination of Section 68A.8 is here presented because urged by plaintiffs. Pertinent provisions are: "the district court may grant an injunction restraining the examination (including copying) of a specific public record, if the petition supported by affidavit shows and if the court finds that such examination would clearly not be in the public in-

terest and would substantially and irreparably injure any person or persons. The district court shall take into account the policy of this chapter that free and open examination of public records is generally in the public interest, even though such examinations may cause inconvenience or embarrassment to public officials or others." Even if it is assumed that Chapter 68A modifies the Rules of Criminal Procedure, and even if it is assumed the court approval in Section 68A.7, which is one way to remove a public record from the confidential status granted by Section 68A.7, is to be exercised in the light of Section 68A.8, it is concluded that the Section 68A.8 does not, in the present case, support enjoining the subpoena. Brown's petition, supported by affidavit states, in part, Division One, paragraph 15: "dis-

closure of the records is contrary to public interest and would substantially and irreparably injure the Plaintiff. It is clearly in the public interest that books and periodicals * * * remain private and confidential absent a showing of compelling State interest." The Library's petition and affidavit of Director of Library, among other things, refer to "substantially and irreparably injur[ing] those persons [cardholders] by the invasion of their constitutionally protected rights to privacy and would clearly not be in the public interest", and to an undue burden to comply with the subpoena. Under Section 68A.8 the burden is on the person or unit seeking an order to restrain the examination, considering that disclosure is favored, even though such examination may cause inconvenience or embarrassment to public

officials or others. In spite of the testimony at the hearing, the Court cannot conclude, in the language of Section 68A.8, that the plaintiffs have maintained the burden of proof that "such examination would clearly not be in the 'public interest' and [that] it would substantially and irreparably injure any person." Investigation of crimes is certainly in the public interest and the specifics of the application and subpoena do not indicate to the contrary. The Court also cannot accept the notion of "substantial" and "irreparable" injury because of the general claims of invasion of privacy, in possibly having uncovered that plaintiff Brown had checked out a book on the list, which fact might never have been made public, or in having a high school teacher, as testified to, decide that she would not have sent

an advanced placement class to read books in the library under those call numbers, as she did, if she had known library records could be checked. It should be noted that Rule of Criminal Procedure 5(6) requires that the application and order of approval be maintained by the clerk in a confidential file. The subpoena does not on its face reflect that it has been kept in a confidential file and was introduced as exhibit in this case. Plaintiff Brown, in amendment to his petition dated January 23, 1980, alleged he had borrowed at least two of the books listed in the subpoena issued by the defendant.

Accordingly, the Court concludes that the Iowa Rules of Criminal Procedure control over Chapter 68A, that the Library Board's response to the subpoena is governed by those sections, and that,

accordingly, the relief under those sections is adequate. Further, even if Chapter 68A is considered to be applicable, the plaintiffs have not maintained their burden of proof under Chapter 68A.8 to secure an order restraining examination of these public records, both that such examination would clearly not be in the public interest and would substantially and irreparably injure any person or persons.

3. Constitutional Arguments.

Plaintiffs argue an invasion of constitutionally protected rights in the subpoena procedure. Plaintiff Brown in his petition argues a violation of the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution; he refers to a chilling effect upon First and Fourteenth Amendment rights to read and study books and peri-

odicals of his choosing without unreasonable interference and scrutiny by the general public, to an invasion of constitutional right of privacy by circulation records being open to the public, and to a substantial loss of freedom of expression and pursuit of constitutionally protected First Amendment activity as long as defendants attempt to enforce the subpoena. Plaintiff Library Board, in its petition, in addition to alleging burden on it in complying with the subpoena, alleges that disclosure of information sought in the subpoena constitutes an unwarranted invasion of the privacy of cardholders, which would substantially and irreparably injure their constitutional right to privacy.

There is no specifically entitled right to privacy in either the United States Constitution or the Iowa Consti-

tution. However, in recent years there have been many cases, and much commentary, on various facets of this concern, as a claimed right to be free from surveillance and intrusion, a claimed right not to have private affairs made public, and a claimed right to be free in actions, thought, experience and belief from control and compulsion. See discussion in American Constitutional Law (1978), Tribe, Chapter 15, Rights of Privacy and Personhood. The Supreme Court of Iowa (5-4) in State v. Pilcher, 242 N.W.2d 348 (1976), holding unconstitutional in certain respects Iowa statute regulating consensual sodomitical practices, at page 356 of the opinion, quoting from another opinion, stated: "The general right of privacy * * * has been viewed as emanating from the first amendment's guarantee of freedom of asso-

ciation, NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 1488 (1958); and of speech, Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); the fourth amendment, Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, L.Ed.2d 889 (1968); the equal protection clause of the fourteenth amendment, Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed. 1010 (1967); the ninth amendment, Griswold v. Connecticut, 391 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Goldberg J. concurring); the penumbras of the Bill of Rights, id., and the concept of liberty guaranteed by the due process clause of the fourteenth amendment, Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The Court is satisfied that the candid approach of Roe v. Wade, supra, and of Mr. Justice Harlan's concurrence in Griswold v. Con-

necticut, supra, 381 U.S. at 499, 85 S. Ct. 1678, that the due process clause of the fourteenth amendment provides substantive protection for fundamental human values "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937), represents the preferred view. *** Lovisi v. Slayton, supra, 363 F.Supp. 620, 624." This quotation and result indicate a partial acceptance of a constitutional right of privacy.

The Board, in its petition, does not appear to claim a violation of a constitutional right of its own, as against the state action, but appears to be appearing only as a fiduciary for the cardholders and alleging unwarranted invasion of their privacy. There does not appear to be any basis for considering that the Board has any constitutional

rights against the state. The First Amendment to the U.S. Constitution refers to freedom of speech or press; the Fourth Amendment refers to "the right of the people to be secure in their persons, houses, papers"; the Fifth Amendment states that "no person * * *shall be deprived of life, liberty and property, without due process of law"; the Ninth Amendment states: "the enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"; the Fourteenth Amendment says no state shall "deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." There is no suggestion here that a political unit of a state has a federal constitutional right against the

state. The Iowa State Constitution, Bill of Rights, does not include governmental units; see Art. 1, (1): "All men are, by nature, free and independent, and have certain unalienable rights- among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness." (7). "Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or the press." (8). "The right of the people to be secure in their persons, houses, papers and effects, [sic] against unreasonable searches and seizures shall not be violated..." (9) No person shall be deprived of life, liberty, or property without due process

of law." (25) "This enumeration of rights shall not be construed to impair or deny others, retained by the people."

The cardholders in the petition would classify as persons for purpose of claiming whatever constitutional protection is there. However, there has been no demonstration of a constitutional violation by the issuance or service of the subpoena. The First Amendment refers to not "abridging the freedom of speech." The action of the Board, in responding to the subpoena, does not stop speech; the only evidence of "chilling speech", sometimes referred to in cases, was the judgment of a high school teacher that she wouldn't have sent her students to "read" at the library, in the area of the described call numbers, if she had known that library records could be checked by someone outside the library.

This is a highly subjective and speculative judgment as to what the effect might be on the "speech" of the students or anyone else, because they might not read, because they feared someone might look at a library transaction card and might discover their name. There are provisions for confidentiality in the Rule of Criminal Procedure 5(6). Interestingly, the testimony of the teacher did not indicate at all that she would read less because transactions might be checked. The named plaintiff Brown did not testify, in support of the conclusions of the petition, that he would read less or that his "speech" would be "chilled" because of his knowledge that the transactions might be checked by a criminal investigation subpoena. Note this is not the same case that was involved in the early stage of this liti-

gation with library records classifying as "public records", subject to required disclosure to all the public. A reference to the effect of a person's knowledge of governmental activities as a "chilling" effect on the First Amendment right is contained in Laird v. Tatum, 92 S.Ct. 2318, 2324 (1972): "In recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent or 'chilling', effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights * * * In none of these cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the

agency might in the future take some other and additional action detrimental to the individual. Rather, in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions he was challenging." The governmental activity in this case is not regulatory, proscriptive or compulsive as to the cardholder. Accordingly, the Court concludes there is no basis for finding a First Amendment violation.

The Fourth Amendment does not in this case present a basis for arguing a violation of a "right of privacy" of cardholder. The language of the Fourth Amendment is: "the right of the people to be secure in their persons, houses,

papers and effects, against unreasonable searches and seizures, shall not be violated." The United States Supreme Court, in U.S. v. Miller, 96 S.Ct. 1619 (1976) decided that a bank depositor had no Fourth Amendment right in the bank records relating to the deposit. See also Smith v. Maryland, 99 S.Ct. 2577 (1979) (no 4th Amendment problem in use of telephone pen registers). Similarly the cardholders should be considered to have no Fourth Amendment rights in the records of the library. Plaintiffs do not in petitions or briefs or oral argument argue the issue of compelled self-incrimination (5th Amend. and 14th Amend.).

The reference in the Ninth Amendment to "not denying other rights retained by the people," the reference in the Fourtheenth [sic] Amendment to "depriving a person of life, liberty or property with-

out due process of law," or "to depriving a person of equal protection of the law" are much too vague in their statement to support a construction of a right of privacy, a constitutional right, in library records, so as to, for instance, invoke a claimed right to notice and hearing in this subpoena case. The apparent acceptance by the majority opinion in the Iowa Supreme Court in State v. Pilcher, quoted supra, of a right of privacy, accepts a statement that "the due process clause of the fourteenth amendment provides substantive protection for fundamental human values 'implicit in the concept of ordered liberty' . . . represents the preferred view." This Court is unable to conclude that a right to conduct transactions in a library free from investigative subpoena of the records of those transac-

tions is a fundamental human value implicit in the concept of ordered liberty. There is language in a very recent Court of Appeals case from the Sixth Circuit, J.P. v. De Santi, 653 F.2d 1080 (1981), which reflects the Court's difficulties in trying to find a constitutional base for a right of privacy and for objections to disclosure of information on library records. That case concerned, inter alia, an action by juveniles to enjoin the compilation and dissemination of social histories, after adjudication, to 55 governmental, social, and religious agencies that were members of a "social services clearing house." The court refused to find a federal constitutional right of privacy against such dissemination. Pertinent language from that opinion, beginning at page 1087, is: "The Constitution does not explicit-

ly mention a right of privacy. Nor has the Supreme Court recognized the existence of a general right to privacy. At various times the Court has found a concern for privacy underlying some of the provisions of the Bill of Rights. * * * The Supreme Court has also held in a line of cases that the Constitution protects an individual's interest in independence in making certain kinds of important decisions. * * * However, the fact that the Constitution protects several specific aspects of individual privacy does not mean that it protects all aspects of individual privacy. * * * Courts called upon to balance virtually every government action against the corresponding intrusion on individual privacy may be able to give all privacy interests only cursory protection. * * * Inferring very broad 'constitutional'

rights where the Constitution itself does not express them is an activity not appropriate to the judiciary. * * * For all of the foregoing reasons we conclude that the Constitution does not encompass a general right to nondisclosure of private information. We agree with those courts that have restricted the right of privacy to its boundaries as established in Paul v. Davis, supra, [96 S.Ct. 1155 (1976)] and Roe v. Wade, 410 U.S. at 152, 93 S.Ct. at 726 -- those personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' * * * The interest asserted by appellant class in nondisclosure of juvenile court records, like the interest in nondisclosure at issue in Paul v. Davis, [no constitutional objection to circulation to merchants by police of fact of arrest for shoplifting for which he had not

been convicted] is 'far afield' from those privacy rights that are 'fundamental' or 'implicit in the concept of ordered liberty'. * * * Our opinion simply holds that not all rights of privacy or interests in nondisclosure of private information are of constitutional dimension, so as to require balancing government action against individual privacy."

Accordingly, the Court is unable to conclude that there has been a demonstration of a constitutional violation either as to the Board or the individual plaintiff in the procedure referred to in this case of securing the county attorney subpoena and presentation to the Board, either on the basis of the Fourteenth Amendment of the United States Constitution or the Iowa Constitution, Art. I, Section 1, 7, 8, 9 and 25.

## CONCLUSIONS OF LAW

By way of summary of the conclusions referred to above, the following conclusions of law are submitted.

1. With respect to the Board's allegations as to the burden in compliance with the county attorney's subpoena in issue in this case, the Court concludes that equitable relief should not be granted because the remedy at law is adequate because the Board may assert, in the proceedings for enforcement of the subpoena, whatever defenses it may claim to have. There is no judgment by this holding that such defenses will therein be held to be valid.

2. Chapter 68A, The Code, and particularly Section 68A.8, do not apply to proceedings for enforcement of the criminal investigation subpoena under the Rules of Criminal Procedure.

3. If Chapter 68A, and particularly

Section 68A.8, were considered to be applicable as a means of controlling proceedings for enforcement of the criminal investigation subpoena, it is concluded that such reference is unavailing to plaintiffs, because they have not maintained their burden, under Section 68A.8, to restrain examination of the library records, that such examination would clearly not be in the public interest and would substantially and irreparably injury any person or persons.

4. There has been no demonstration of a constitutional violation as to the Board or the individual plaintiff, in the procedure in this case, of securing the county attorney subpoena and presentation to the Library Board, either on the basis of the Fourteenth Amendment of the United States Constitution or the Iowa Constitution, Article I, Sections 1,

7, 8, 9 and 25.

DECREE

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the petitions for declaratory and equitable relief are hereby dismissed.

Costs are assessed to the plaintiff and the recast plaintiff.

DATED this 17th day of September, 1981.

/ Louis A. Lavorato
JUDGE - FIFTH JUDICIAL DISTRICT OF IOWA

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NO. 82-1830

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STEVEN BROWN, and
BOARD OF TRUSTEES OF THE PUBLIC
LIBRARY OF DES MOINES, IOWA,

Petitioner,

vs.

DAN L. JOHNSTON, Polk County Attorney, and
GERALD SHANAHAN, Chief, Division of
Criminal Investigation of the Iowa Depart-
ment of Public Safety, State of Iowa,

Respondents.

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# RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether an Article III case or controversy is present in a proceeding challenging a subpoena where there is no present effort to enforce the subpoena, the underlying investigation has been terminated, and there is no substantial likelihood of that another similar subpoena will be issued?
2. Whether claimed "chilling" effect of gathering of information by law enforcement authorities without allegation of specific, concrete and immediate injury establishes an Article III case or controversy?
3. Whether a substantial constitutional question is raised by a unanimous Iowa Supreme Court opinion which holds that the State's interest in a specific, bona fide criminal investigation outweighs the general First Amendment or privacy interest of library patrons?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STEVEN BROWN, and
BOARD OF TRUSTEES OF THE PUBLIC
LIBRARY OF DES MOINES, IOWA,

Petitioner,

vs.

DAN L. JOHNSTON, Polk County Attorney, and GERALD SHANAHAN, Chief, Division of Criminal Investigation of the Iowa Department of Public Safety, State of Iowa,

Respondents.

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# RESPONDENT'S BRIEF IN OPPOSITION

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Respondents Dan L. Johnston, Polk County Attorney, and Gerald Shanahan, Chief, Division of Criminal Investigation of the Iowa Department of Public Safety, State of Iowa, respectfully submit this Brief in Opposition to Petitioner's prayer for a Writ of Certiorari in the above captioned matter.

## ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to constitutional and statutory citations presented by Petitioner, Petition for Writ of Certiorari at 3, the following provisions are directly involved:

Constitution of the United States:

Article III, Section 2.

> The judicial power shall extent to all Cases . . . [and] Controversies. . . .

Statutory Provision:

Iowa Code Section 802.3:

> Felony--aggravated or serious misdemeanor. In all cases, except those enumerated in section 802.1, an indictment or information for a felony or aggravated or serious misdemeanor shall be found within three years after its commission.

## COUNTERSTATEMENT OF THE CASE

Respondents accept and adopt Petitioners' Statement of the Case, Petition

for Writ of Certiorari, at 5-10 as far as it goes. In addition, however, Respondents state that since the action was first begun, the statute of limitation applicable to the crimes under investigation has now expired, Section 803.2, Code of Iowa (1983) (Opposition Appendix at A-1, hereinafter referred to Opp.App.), that cattle mutilations cease to be a problem for law enforcement in Polk County, Affidavit of Dan Johnston, (Opp.App. at A-4) and that the investigation which resulted in the subpoena which formed the basis of this lawsuit has now terminated. Id.

## SUMMARY OF ARGUMENT

1. Because the investigation which led to the challenged subpoena of library records has terminated, no Article III case or controversy is present.

2. Even if this case were not moot, which it is, the alleged "chilling" effect of data gathering by law enforcement authorities does not establish a case or controversy within Article III.

3. The unanimous opinion of the Iowa Supreme Court applied the consistent holdings of this Court in finding that the State's interest in a bona fide criminal investigation outweighs whatever First Amendment or privacy interests of library patrons are implicated.

## REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. Because the investigation which led to the challenged subpoena of library records has terminated, no Article III case or controversy is present.

This Court since the very beginning has recognized that its jurisdiction is limited to actual "cases or controversies" that are presented to it, Hayburn's Case, 2 Dall. 409 (1796), particularly where constitutional questions are involved. Hall v. Beals, 396 U.S. 45 (1943). Because no case or controversy is presented here, certiorari should be denied.

Petitioners challenge a subpoena that was issued on November 27, 1979. At the time, law enforcement officials in Polk

County hoped that information obtained could help focus an investigation of bizarre cattle mutilations occurring in the Polk County area. Brown v. Johnston, 328 N.W.2d 510, 511 (Iowa 1983)

The statute of limitations has now run on whatever crimes may have occurred. Under Iowa law, the maximum period in which a criminal action may be brought for any crime except murder in three years. See Section 802.3, Code of Iowa, 1983 (Opp.App. at A-1). As a result, the Polk County Attorney's office has closed the investigation. See Affidavit of Dan Johnston, Polk County Attorney (Opp.App. at A-4).

In addition, it appears that the cattle mutilation problems have terminated in Polk County. Johnston Affidavit, Opp.App. at A-4. There is thus no substantial argument that the legal questions raised in this proceeding are "capable of

repetition, yet evading review," Roe v. Wade, 410 U.S. 113 (1973); Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 488 (1911).

2. Even if the cause were not moot, which it is, the alleged "chilling" effect of data gathering by police authorities does not establish a case or controversy within Article III.

Law enforcement officials in Polk County, through their subpoena, simply sought to gather information that might be of assistance in their criminal investigation. At the time the subpoena was issued, the records involved were public records under Iowa's Open Records Act, Chapter 68A, Code of Iowa (1981). This Court has held, that the mere gathering of information by government authorities does not provide a case or controversy, Laird v. Tatum, 408 U.S. 1 (1971), reh'g denied 409 U.S. 901 (1972). As was noted in Tatum, "Allegations of subjective 'chill' are not an

adequate substitute for a claim of specific present objective harm or a threat of specific future harm." 408 U.S. at 13-14. In this case, Petitioners make no allegation of specific tangible loss such as loss of employment. Socialist Workers Party v. Attorney General, 419 U.S. 1314, 1317-19 (1974) (Marshall, J., in chambers). The rule in Tatum is thus clearly applicable here, and is ample grounds to defeat Petitioner's certiorari effort.

Given the abstract character of their interests, petitioners have serious standing problems. Like bankers who compile records of patrons, library trustees lack standing to vicarously assert the rights of third parties, California Bankers v. Schultz, 416 U.S. 21 at 68-9 (1974). And, petitioner Steven Brown lacks standing since he has not alleged he is within the class of patrons whose library records are

within the scope of the challenged subpoena. Id. at 57. The lack of real, immediate, conflicting interests makes this case an unattractive vehicle for adjudication of constitutional issues.

3. Whether a substantial constitutional question is raised by a unanimous Iowa Supreme Court opinion which holds that the State's interest in a specific, bona fide criminal investigation outweighs the general First Amendment or privacy interest of library patrons?

A final reason for denial of certiorari, in addition to the clear obstacles to constitutional adjudication cited above, is the conventional character of the unanimous opinion of the Iowa Supreme Court. This Court has clearly held that general First Amendment and privacy interests in nondisclosure of information must be subordinated to the specific interest of society involved in criminal justice investigations. Nixon v. United States, 418 U.S. 683 (1973); Branzburg v. Hayes, 408 U.S.

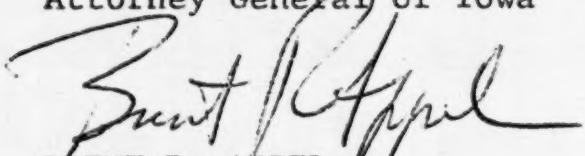
665 (1972). And, where cattle mutilation is concerned, there is no significant likelihood that the State is engaged in constitutionally improper First Amendment content censorship in the guise of regulation of conduct. Contrast Cohen v. California, 403 U.S. 15 (1971)

## CONCLUSION

For the above cited reasons, Respondents pray that the Petition for Writ of Certiorari in the above captioned matter be denied.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



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## APPENDIX A

Section 802.1-4, Code of Iowa (1983)

802.1

Murder. A prosecution for murder in the first or second degree may be commended at any time after the death of the victim.

802.2

Repealed by 81 Acts, ch. 204, § 12.

802.3

Felony--aggravated or serious misdemeanor. In all cases, except those enumerated in section 802.1, an indictment or information for a felony or aggravated or serious misdemeanor shall be found within three years after its commission.

802.4

Simple misdemeanor--ordinance. A prosecution for a simple misdemeanor or violation of a municipal or county rule or ordinance shall be commenced within one year after its commission.

APPENDIX B

NO. 82-1830

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Respondents.

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AFFIDAVIT

I, Dan L. Johnston, being first duly sworn, state as follows:

1. That I am a Respondent in the case of Steven Brown and Board of Trustees of the Public Library of Des Moines, Iowa, Petitioner, vs. Dan L. Johnston, Polk

County Attorney, and Gerald Shanahan, Chief, Division of Criminal Investigation of the Iowa Department of Public Safety, State of Iowa, Respondents.

2. That I am the duly elected Prosecuting Attorney for Polk County, Iowa.

3. That on November 27, 1979, an application for a County Attorney's Subpoena Duces Tecum under Rule 5(6) of the Iowa Rules of Criminal Procedure, was presented to the Iowa District Court by a member of my staff, requested the issuance of such a subpoena for information contained in certain records in the possession of the Public Library of Des Moines, Iowa.

4. That on November 27, 1979, after reviewing such application, the Iowa District Court issued a Subpoena Duces Tecum directing the Custodian of Records of the Des Moines Public Library to release the requested information.

5. That the requested information was sought as part of an ongoing criminal investigation into the mutilation of cattle then occurring in Polk County, Iowa.

6. Cattle mutilations are no longer a problem in that the activity has terminated in Polk County, Iowa.

7. The statute of limitations, Section 802.3, Code of Iowa, has expired on the crimes that were the subject of previous investigation.

8. That this criminal investigation is no longer active and the matter is now closed.

9. That the Polk County Attorneys Office is no longer attempting to enforce the Subpoena Duces Tecum issued on November 27, 1979.

DAN L. JOHNSTON
Polk County Attorney

STATE OF IOWA )
) SS:
COUNTY OF POLK )

Subscribed and sworn to before me on this ____ day of _____, 1983.

SHIRLEE J. VANDERVORT
Notary Public for the
State of Iowa